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February 21, 2003

via Hand Delivery

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423

Re: Procedures to Expedite Resolution of Rail Rate Challenges to be Considered Under the Stand-Alone Cost Methodology, STB Ex Parte No. 638

Dear Secretary Williams:

Enclosed for filing in the above-captioned matter are the original and 10 copies of the Testimony of Richard E. Weicher on behalf of the Burlington Northern and Santa Fe Railway Company.

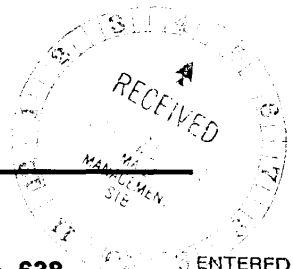
Please date stamp the extra copy of this cover letter and return it to the messenger who delivered this filing.

Sincerely,

Samuel M. Sipe Jr.
Counsel for The Burlington Northern
and Santa Fe Railway

Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD



PROCEDURES TO EXPEDITE RESOLUTION OF RAIL RATE CHALLENGES TO BE CONSIDERED UNDER THE STAND-ALONE COST METHODOLOGY	**STB Ex Parte No. 638**

TESTIMONY OF RICHARD E. WEICHER ON BEHALF OF THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

This is the written testimony of Richard E. Weicher, Vice President and Senior Regulatory Counsel of The Burlington Northern and Santa Fe Railway Company ("BNSF"). Pursuant to the Board's February 6, 2003 Notice of Public Hearing, Mr. Weicher has previously submitted a Notice of Intent to Participate in the Board's public hearing scheduled for February 27, 2003.

BNSF submits this testimony in support of the Board's efforts to streamline and expedite rail rate cases considered under the stand-alone cost methodology. The recent proliferation of coal rate reasonableness litigation has created enormous costs and burdens for BNSF. We know that it has created burdens for the Board as well. The Board currently has before it nine stand-alone cost cases and one rate reasonableness challenge involving the jurisdictional variable cost standard. BNSF is the defendant in

six of the rate cases that are pending before the Board. This level of activity in the area of rate reasonableness litigation is without precedent since the ICC's adoption of the *Coal Rate Guidelines*.

The upsurge in coal rate litigation has not been prompted by price increases on BNSF coal traffic. On the contrary, the overall trend of BNSF's coal transportation rates in recent years has been a downward one. On the movements that have been the subject of recent rate challenges, prior to the expiration of then-existing contracts, we offered shippers reduced contract rates that the shippers found to be unacceptable. BNSF believes that the recent increase in coal rate litigation as it relates to BNSF results from a view among shippers that they can achieve a more favorable outcome in a regulatory forum than in the marketplace. Shippers may interpret some recent Board decisions, including decisions in rate cases involving BNSF's predecessor companies, as a sign that the Board could become more active in regulating rail rates when there is no indication of any abuse of market power. As the U.S. Court of Appeals for the D.C. Circuit noted in a recent decision involving the Board's relaxation of the market dominance standard, "[i]t is certainly plausible that some shippers would consider regulators' hands to be friendlier than invisible ones."[1]

The Mediation Proposal

BNSF therefore strongly supports any efforts by the Board that would encourage market-based resolution of rate disputes with its shippers. Because mediation may promote private resolution of rate disputes, BNSF supports the Board's proposal that

[1] *AAR v. STB*, 306 F.3d 1108, 1111 (D.C. Cir. 2002).

the parties to potential rate litigation engage in non-binding and confidential mediation prior to the initiation of a case.

A number of shippers express concern that mediation could delay the resolution of rate challenges. We believe that this concern over delay is misplaced. At most, the Board's mediation proposal would result in a brief two-month delay of litigation. Moreover, the mediation could be terminated earlier if it is clear the parties' positions have become intractable. Some shippers use their concern over delay to propose measures that would either neutralize the value of the mediation, such as Edison Electric's opt-out proposal, or change existing legal standards, such as the Western Coal Traffic League's proposal that railroads be required to quote rates well in advance of the shipper's need for service. These proposals should not be adopted.

More Restrictive Discovery Standards

In addition to seeking ways to reduce the incidence of litigation, the Board's proposal seeks to minimize the burden of litigation that does occur, particularly in the area of discovery. BNSF also supports these proposals. One way to reduce discovery burdens is to adopt more restrictive discovery standards, and BNSF supports the Board's proposal that discovery should be limited in SAC cases to information for which there is a demonstrated need. BNSF also believes it is important for the Board to emphasize that this standard will be applied evenly to complainants and defendants. It would be inappropriate to apply restrictive discovery standards only to data requests by defendants. Indeed, the primary discovery burdens in SAC rate cases fall on defendants and many of these burdens result from complainants' overreaching discovery requests.

To give a recent example, in the *Otter Tail Power* case, the complainant submitted four sets of discovery requests, more than 60 pages of text, including (with subparts) 10 requests for admission, 56 interrogatories, and approximately 600 requests for production. The effort of responding to these discovery requests is enormous. BNSF's typical discovery response requires the production of approximately 150 data tape cartridges that must be prepared with extensive computer programming, approximately 100 electronic files produced on compact disc or floppy disk, and over 30,000 pages of documents. BNSF conservatively estimates that its employees devote in excess of 500 hours preparing such materials, excluding the time spent by several employees in BNSF's Law Department who are directly involved in discovery efforts. And most of the data produced by a defendant in discovery is not even used in the presentation of the complainant's case. Moreover, when the first round of discovery is complete, complainants often seek extensive supplemental discovery just before filing their evidence so they can base their filings on the most current data available. These supplemental requests are almost as extensive as the original requests.

Motions to Compel

Broad discovery not only imposes undue burdens on the defendant but it also leads to complex and time consuming litigation over motions to compel. BNSF believes that the adoption of more restrictive discovery standards will cut back on the number of litigated discovery disputes and therefore reduce the time required by the Board to supervise the preliminary stages of a rate case. And when motions to compel are filed, BNSF agrees with the Board's proposal that Board staff should have the ability to convene informal conferences. However, BNSF does not support the Board's proposal

to reduce the time for parties to reply to motions to compel. The issues raised in those motions often involve substantive issues that may be relevant to the presentation or analysis of SAC evidence. Artificial time limits on briefing these issues may actually complicate the Board's efforts to resolve discovery disputes by inhibiting the development of an adequate record.

Other Proposals

The Board's February 6, 2003 Notice indicates that it is interested in other ways to reduce the burdens on the parties and the Board from rate reasonableness cases and to expedite proceedings. BNSF offers two additional suggestions. First, the Board could consider changes to the presentation of variable cost evidence in stand-alone cost rate cases. A substantial amount of effort in SAC cases involves the presentation of variable cost evidence, particularly in the development and analysis of movement-specific adjustments to URCS. Much of a complainant's discovery is directed to variable costs and many recent discovery disputes have related to variable cost issues. But variable costs should be relevant only to the question of the Board's jurisdiction, which may not be an issue in all cases. We agree with the proposal of the Association of American Railroads that the Board should consider ways to avoid costly litigation over variable costs except in cases where those costs are likely to be at issue.

Second, the Board should adopt measures that strictly enforce the complainant's burden of proof in SAC cases by presenting a viable case in chief on opening. It has been BNSF's experience that the complainant in a SAC case typically presents a minimal and often seriously flawed case on opening and then expects to correct and amplify its assumptions on rebuttal. This makes it difficult for the defendant to submit

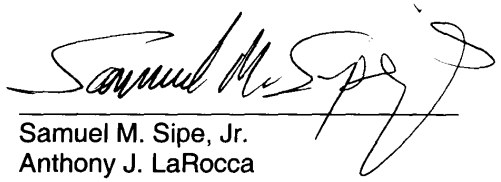
meaningful reply evidence, since the complainant's real case is held back until the rebuttal stage, but it also complicates the Board's evaluation of the evidence. The Board relies on the parties to carry out many of the complex data analyses that are needed in a SAC case, and this can occur only if the complainant is required to present a complete and viable case on opening and is not permitted to change its assumptions on rebuttal.

Enforcing the complainant's burden of proof can assist in expediting rate cases in two ways. First, it should obviate the need for defendants to file motions to strike impermissible rebuttal testimony. Second, it should facilitate the Board's decision making by providing the Board with a cleaner record.

Conclusion

In conclusion, BNSF supports the Board's efforts to reduce the burdens associated with rate reasonableness litigation under the SAC standard and to expedite SAC cases.

Respectfully submitted,



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February 21, 2003

CERTIFICATE OF SERVICE

I hereby certify that this 21st day of February 2003, a copy of the foregoing was served by hand delivery or overnight mail on:

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